



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

January 31, 1995

Mr. Raymond A. Cowley
Jarvis & Kittleman
P.O. Box 1416
McAllen, Texas 78505-1416

OR95-060

Dear Mr. Cowley:

You have asked whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 30442.

The United Irrigation District (the "district") received a request for the following documents:

- (1) True and correct copies of any and all documents evidencing any of the meetings of the board . . . for the period of January 1, 1992 through present. (This request includes all agendas, minutes, and tape recordings.)
- (2) True and correct copies of any insurance agreement under which any insurance company . . . may be liable to satisfy part or all of the judgment which may be entered in this action

The district contends that the requested records are excepted from disclosure under section 552.103(a). You state that the district received a previous determination from this office confirming the applicability of section 552.103(a).

In Open Records Letter No. 94-096 (1994), this office had advised the district that it could withhold certain records from disclosure pursuant to section 552.103(a) to the extent that those records had not already been seen by the opposing parties in a then-

pending lawsuit.¹ However, that letter ruling was limited to the particular records at issue and could not be relied upon as a "previous determination" under section 552.301 regarding any *other* records. Open Records Decision No. 435 (1986) at 2. The district has now received an open records request from the same requestor for what appear to be *different* records. We will address the applicability of chapter 552 to the records at issue in the current request.

We note initially that this office asked that you supply information as to when the open records request was received by the district. The request is dated November 3, 1994, and your request letter was not sent to this office until November 15, 1994. Section 552.301(a) of the Government Code provides:

A governmental body that receives a written request for information that it considers to be within one of the exceptions under Subchapter C must ask for a decision from the attorney general about whether the information is within that exception if there has not been a previous determination about whether the information falls within one of the exceptions. The governmental body must ask for the attorney general's decision within a reasonable time not but later than the 10th calendar day after the date of receiving the written request.

Section 552.302 of the Government Code provides that "[i]f a governmental body does not request an attorney general decision as provided by Section 552.301(a), the information requested in writing is presumed to be public information." You did not supply this office proof of when the request was received by the district. You speculate that the request may have been received by the district after November 5, 1994, but state that "[t]he actual date of receipt by the District is unknown."²

This office further asked that copies of the requested documents be supplied to this office for review, and advised that your failure to so supply the documents within seven days would waive the district's discretionary exceptions to disclosure. The district had raised section 552.103(a), and to show the applicability of that exception a governmental entity must show that (1) litigation is pending or reasonably anticipated and (2) the information at issue is related to that litigation. *Heard v. Houston Post Co.*, 684

¹We note that some of the records at issue in the previous situation apparently had been seen by the opposing parties to the pending lawsuit and thus could not have been withheld from disclosure pursuant to section 552.103(a).

²You complain that the open records request should not have been sent to the district. However, the district is a governmental body subject to chapter 552, and open records requests are properly sent to a governmental body. Gov't Code §§ 552.001 - .021. Chapter 552 designates an officer for public records for all governmental bodies who must "promptly produce public information" upon application of any member of the public. *Id.* § 552.221. All requests for information must be treated uniformly by the governmental body without regard to the motives or occupation of the requestor. *Id.* §§ 552.222, .223.

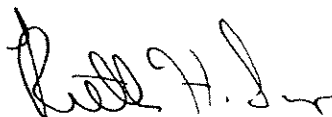
S.W.2d 210, 212 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 (1990) at 4. Section 552.103(a) is a discretionary exception that may be waived. Gov't Code § 552.007; Open Records Decision No. 542 (1990) at 4. The district timely submitted "representative samples" of agendas and meeting minutes. However, these are official records of the public proceeding of a governmental body and so may not be withheld from disclosure. Open Records Decision No. 221 (1979). You do not indicate if the district has tape recordings of its public meetings, but we note that if the district has such these also must be released. Attorney General Opinion JM-1143 (1990); Open Records Decision Nos. 225; 221 (1979).

As to any other information that may be responsive to the request, the district has waived its discretionary exceptions to disclosure by failing to provide proof that a decision was sought from this office within ten days after the district's receipt of the open records request. This office notified you by postcard that failure to provide such proof would result in a waiver of the district's discretionary exceptions. The time limitation found in section 552.301 is an express legislative recognition of the importance of having public information produced in a timely fashion. *Hancock v. State Bd. of Ins.* 797 S.W.2d 379, 381 (Tex. App.--Austin 1990, no writ). This presumption of openness can only be overcome by a compelling demonstration that the information should not be made public. See, e.g., Open Records Decision No. 150 (1977).

Since the district sent this office no documents other than the meeting agendas and minutes, it may be that the district has no other documents that would be responsive to the request. The district is not obligated to provide new information or information that does not exist. Open Records Decision No. 572 (1990). You contend that information about insurance is specifically excepted from discovery and thus the district may not admit nor deny the existence of insurance agreements. We note that section 552.103(a), which is a waivable exception, was designed to protect the governmental body's position in litigation. Attorney General Opinion JM-1048 (1989). However, a discovery privilege will not operate to shield information held by a governmental body from public disclosure. Open Records Decision No. 575 (1990) at 2. Information that is protected in discovery is not thereby made confidential under chapter 552. *Id.*

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request. If you have questions about this ruling, please contact our office.

Yours very truly,

A handwritten signature in dark ink, appearing to read "Ruth H. Soucy", with a stylized flourish at the end.

Ruth H. Soucy
Assistant Attorney General
Open Government Section

RHS/MAR/rho

Ref.: ID# 30442

Enclosures: Submitted documents

cc: Mr. Raymundo López
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(w/o enclosures)